



4-1-1975

Competition, Competitors, and the Political Limits of the Supreme Court's Clayton 7 Policy

Stephen Wasinger

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Stephen Wasinger, *Competition, Competitors, and the Political Limits of the Supreme Court's Clayton 7 Policy*, 50 Notre Dame L. Rev. 693 (1975).

Available at: <http://scholarship.law.nd.edu/ndlr/vol50/iss4/8>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

COMPETITION, COMPETITORS, AND THE POLITICAL LIMITS OF THE SUPREME COURT'S CLAYTON § 7 POLICY

I. Introduction

Although § 7 of the Clayton Act¹ has come to serve as the principal antitrust weapon for attacking corporate mergers and acquisitions, there has yet to be a clear or authoritative statement of that section's scope. This was recently emphasized by Mr. Justice Douglas' impassioned plea for the Supreme Court to review § 7's application to the purer forms of a so-called conglomerate merger so that it might discover the outer limits of § 7.² Section 7 does not expressly forbid all mergers and acquisitions but only those which tend substantially to lessen competition. Since the acquiring and acquired firms in a conglomerate merger have "no discernible relationship,"³ it is not obvious how the merger might tend substantially to lessen competition—at least as that term is ordinarily understood.⁴ Any determination of the legality of a conglomerate merger would require the Court to define exactly what competition as used in § 7 means. By attempting such a definition, the Court could conceptually clarify the present purposes of antitrust policy and the present limits of existing antitrust laws as an effective curb on the growth of capital concentration.

This article attempts to suggest the need for such a clarification by examining the confusion in the Court's principal opinions on § 7 and the political sources of that confusion. There exists already, of course, an excess of information about § 7 and the conglomerate phenomenon. By way of introducing yet another discussion, an observation may be in order. Most writing on antitrust law draws its critical perspective from the discipline of microeconomic analysis. That is understandable since the antitrust statutes, and particularly § 7, attempt to regulate an economic order. Nonetheless, that perspective poses a serious problem of method. Antitrust policy cannot depend upon economic analysis of the academic sort precisely because antitrust laws propose to limit economics or commerce to ends set by the political or legal order. Therefore any economic

1 15 U.S.C. § 18 (1970).

2 *Missouri Portland Cement Co. v. Cargill, Inc.*, 418 U.S. 919, 922 (1974) (Douglas, J., dissenting). See also *United States v. Marine Bancorporation*, 418 U.S. 602, 639 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 583 (1967).

3 H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949) referred to three types of mergers and acquisitions covered by the 1950 amendments to § 7: horizontal, vertical, and conglomerate. "Horizontal acquisitions are those in which the firms involved are engaged in roughly similar lines of endeavor; vertical acquisitions are those in which the purchase represents a movement either backward or forward toward the ultimate consumer; and conglomerate acquisitions are those in which there is no discernible relationship in the nature of the business between the acquiring and the acquired firms." See also *The Procter & Gamble Co.*, 63 FTC 1465, 1542-45 (1963); E. KINTNER, *PRIMER ON THE LAW OF MERGERS* 211-220 (1973); and note 45 *infra*.

4 See, e.g., Adelman, *The Antimerger Act, 1950-1960*, 51 AM. ECON. REV. 236, 243 (May 1961); Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231, 1237-38 (1968); Rill, *The Trend Toward Social Competition under Section 7 of the Clayton Act*, 54 GEO. L.J. 891, 906-07 (1966); Goldberg, *The Effect of Conglomerate Mergers on Competition*, 16 J. LAW & ECON. 137, 158 (1973); Markham, *Antitrust and the Conglomerate: A Policy in Search of a Theory*, 44 ST. JOHN'S L. REV. 90, 130-31 (Special Ed. 1970); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1394-95 (1965).

theory's utility for antitrust policy depends upon the relevance of its critical assumptions to the larger ends of political life. When assessing the Supreme Court's antitrust policies, then, the crucial perspective must be political: The question is not whether the Court's opinions correspond to the latest micro-economic theories of price and firm behavior, but whether the Court's economics ultimately correspond to the political concerns which define the place of economics in the American polity. This observation should explain certain obvious limits of this article: It neither exhaustively surveys § 7 case law nor analyzes in detail any particular case; rather it merely suggests the need for rethinking the purposes of § 7 by indicating the obvious, political limits of the Court's opinions.

II. The Basic Doctrine

A. *The Statute*

Section 7 of the Clayton Act, as amended, provides in pertinent part:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets, of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly of any line of commerce.⁵

What those words mean, much less their purpose, is greatly disputed. The dispute is complicated in large part because § 7 was amended in 1950 to correct apparent defects in the wording of the 1914 act. The original § 7 forbade only stock acquisitions which might substantially lessen competition between the acquiring and acquired companies; it was silent about asset acquisitions, mergers, and consolidations as well as about the more remote competitive effects of such acquisitions. The 1950 amendments clearly indicate by their language that Congress intended to expand the scope of the 1914 act; the problem is how and why.

The express language of the amended § 7 makes at least this much clear: Section 7 applies to every corporate merger or acquisition whatever its form, but it invalidates only those mergers whose effect might be substantially to lessen competition in a relevant product ("line of commerce") or geographic ("section of the country") market. How far § 7's scope was expanded depends upon the interpretation given the key, but undefined terms: competition, substantially, and market. The case law on § 7 reflects the equivocity and hence the various possibilities of those words.

B. *The Definitive Cases*

The Supreme Court first attempted a systematic interpretation of amended § 7 in *Brown Shoe Co. v. United States*,⁶ which invalidated a merger between

⁵ 15 U.S.C. § 18 (1970).

⁶ 370 U.S. 294 (1962).

two companies engaged in the manufacturing and retailing of shoes. The merger created a company accounting for approximately 5 percent of the market, and resulted in some horizontal and vertical integration between the companies.⁷ While there was evidence of some increase in concentration within the industry, by usual standards the industry was not oligopolistic: The 24 largest manufacturers produced only 35 percent of the shoes, the top four but 23 percent.⁸

Since these facts hardly suggested that the merged firm would or could dominate competition, the merger's validity obviously depended upon how the Court would choose to interpret the terms "competition" and "substantial." In accordance with a respectable principle of interpreting antitrust statutes, the Court could have read the statutory language in its ordinary or traditional sense, without reliance upon the legislative history of the 1950 amendments.⁹ Had it attended to the statute's language, the Court could properly have claimed that the 1950 amendments intended only to enlarge the number of mergers covered by § 7, not to change the test of illegality, because both the 1914 act and the 1950 amendments use identical language to describe the standard for evaluating mergers. Since the language of both acts was identical, pre-1950 case law could serve to interpret the phrase "substantially to lessen competition." On that basis the merger most probably would have been legal.¹⁰

Despite the identical language, the Court chose to argue that the 1950 amendments significantly changed the test for § 7 violations. This required the Court to circumvent the obvious meaning of the statutory language. To discover a new test, the Court resorted to the legislative history and discovered certain paramount concerns pervading Congressional debate on the 1950 amendments. First and dominant was a fear of what was considered to be a rising tide of economic concentration in the American economy. This was coupled with a desire to retain "local control" over business and to protect small businesses.¹¹ In short, Congress was concerned with economic concentration but not only on "economic grounds"; it was as much concerned with "the threat to other values" which economic concentration was thought to pose.¹²

That conclusion from the legislative history posed an obvious problem: The statute neither mentions concentration or small businesses nor does it include an express statement of policy suggesting its political concerns. The only statutory criterion for distinguishing good from bad mergers is their effect on competition. If the Court's legislative history were correct, Congress must have understood

7 370 U.S. at 302-04.

8 370 U.S. at 300; compare 370 U.S. at 374 n. 9.

9 See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 318 (1897).

10 See, e.g., *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) (merger legal because only 5% of the firms' products were sold in competition); *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 65 F.2d 336 (2d Cir. 1933), *rev'd on other grounds*, 291 U.S. 587 (1934); *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943). H.R. REP. No. 1191, 81st Cong., 1st Sess. 7-8 (1949) cited *International Shoe* to illustrate the proper test for whether a merger substantially lessened competition. This example illustrates how easily legislative history can be used for a variety of purposes. See also *United States v. Von's Grocery Co.*, 384 U.S. 270, 285 (1966) (Stewart, J., dissenting).

11 370 U.S. at 315-16. Compare Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 233-38 (1960) with Note, *Conglomerate Mergers under Section 7 of the Clayton Act*, 72 YALE L.J. 1265, 1278 (1963).

12 370 U.S. at 316.

competition in some extraordinary sense. Here the facts of *Brown Shoe* become relevant. By commonsense standards, the shoe industry was neither highly concentrated nor substantially uncompetitive. While there had been some decline in the number of competitors, the statistics were not conclusive.¹³ The Court's response to this commonsense observation reveals the policy governing its application of § 7. The statute does not require that a merger have actual effects on competition; it requires only that the merger's effect "may be" to affect competition. Congress intended § 7 to arrest mergers "when the trend to a lessening of competition . . . was still in its incipency."¹⁴ The concern was with "probabilities, not certainties."¹⁵

The claim that § 7 deals with competitive effects in their incipency responds skillfully to the commonsense objections because it removes the commonsense limits to the word "competition." If § 7 is concerned with incipient dangers to competition, an examination of actual competitive effects would not discover violations; the Court must predict what might happen to competition as a result of an acquisition. But prediction requires a standard against which forbidden effects can be measured before they actually affect competition. That standard, the Court claimed, existed in the legislative history. By adopting the incipency test, Congress demonstrated a concern with trends toward concentration and numbers of competitors, not with competition. Thus, what seemed to many the most curious statement in *Brown Shoe* in fact most accurately represents the Court's political understanding of § 7. While the statutory language suggests congressional concern with the protection of competition, not competitors, Congress desired to "promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."¹⁶ In short, "competition" as used in the statute meant "competitors" as discussed in the legislative history.

Nowhere is there a better illustration of the political limits of the Court's economics. Though it refers frequently to the results of certain economic analyses

13 As Justice Harlan pointed out, there was hardly any clear evidence of a trend toward concentration. There had been a decline in the number of shoe manufacturers between 1947 and 1956, but there was no increase in the concentration ratios for the largest firms during the same period. 370 U.S. at 374 n.9.

14 370 U.S. at 317. See also *United States v. DuPont*, 353 U.S. 586, 589 (1957).

15 370 U.S. at 323. It must be noted that "incipiency" has no analytical significance; it is a conclusory term. As the Court's legislative history uses the word, it means more than an ephemeral possibility but less than a full-fledged violation of the Sherman Act. Compare 370 U.S. at 318 n.32 with 370 U.S. at 323 n.39.

16 370 U.S. at 344; compare 370 U.S. at 320: "Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." (Emphasis in original.) See also *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958): "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." Compare Kristol, *Republican Virtue v. Servile Institutions*, 8 THE ALTERNATIVE 5, 6 (No. 5, 1975): "[The Founding Fathers] judged an economic system, not merely by whether or not it improved one's standard of living, but also by what it did to the character of the people who participated in that system."

to support its holding, the Court's holding is in fact almost wholly dictated by its understanding of the political purposes of § 7. Were the Court really interested in economic competition, it might have wondered whether small local businesses could any longer compete in the modern shoe industry—not because the larger firms competed unfairly but because competitive conditions had changed.¹⁷ That would be a necessary enquiry for a strictly economic investigation, but the Court had adopted a concept of competition whose substance was political, not economic. Its economic analysis subserves its political end. Thus, though the language in *Brown* can be read to respect a need to balance the interests of competitors and competition, the Court's heart and its holding had clearly chosen competitors, not competition as the end of § 7; or, more accurately, its political understanding of § 7 defined competition in terms of competitors.¹⁸ Though this might not have been clear from a cursory reading of *Brown*, it was obvious to anyone who remembered that the opinion was written by Mr. Chief Justice Warren who, dissenting in *DuPont*, had insisted that competitive structure determined competitive behavior,¹⁹ or for anyone who attempted to coordinate the Court's holding with the economic facts it was called upon to analyze.²⁰

Having defined these political limits to economics, the Court's principal task after *Brown* was to devise a conceptual foundation for its view that competition really meant competitors and that only a concern for competitors would properly reflect the spirit, if not the letter, of the statute. That foundation was presented in the next important § 7 case, *United States v. Philadelphia National Bank*.²¹

Recalling *Brown*'s conclusion that the 1950 amendments reflected a principally political concern with economic concentration, the Court concluded that this concern would sometimes warrant dispensing "with elaborate proof of market structure, market behavior, or *probable anticompetitive effects*."²² Where a merger produces "a firm controlling an *undue* percentage share of the relevant market, and results in a *significant* increase in the concentration of firms in that market," the Court would presume that the merger is "so inherently likely to lessen competition substantially that it must be enjoined. . . ."²³ This new test, the Court insisted, is "fully consonant with economic theory. That '[c]ompetition is likely to be greatest when there are many sellers, none of which has significant market share,' is common ground among most economists and was undoubtedly a premise of congressional reasoning about the antimerger statute."²⁴

17 See *United States v. Von's Grocery Co.*, 384 U.S. 270, 283-92 (1966) (Stewart, J., dissenting).

18 The Court did emphasize that it would be necessary to view a merger functionally, "in the context of its particular industry"; and that courts must take care not to consider selected economic data at the expense of a thorough study of the relevant product and geographic markets. 370 U.S. at 320-22. This caused some to misunderstand *Brown*'s real teaching. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 282 (1966) (Stewart, J., dissenting).

19 *United States v. DuPont*, 351 U.S. 377, 426 (1956) (Warren, C. J., dissenting).

20 See note 13 *supra*.

21 374 U.S. 321 (1963).

22 *Id.* at 363 (emphasis added). See also *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552-53 (1966); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 78 (10th Cir. 1972).

23 374 U.S. at 363 (emphasis added).

24 *Id.* But see Oppenheim, *Antitrust Booms and Boomerangs*, 59 Nw. U.L. Rev. 33, 43 n.41 (1964): "[T]he proposition that oligopoly competition is less effective than competition among a large number of sellers is *not* the consensus among economists."

Though this statement confirms the Court's political concerns, it hardly offers a new § 7 test; or, more accurately, by itself it resolves no § 7 problems because it depends upon two undefined terms: "undue" percentage of the market and "significant" increase in concentration. The Court could establish neither of these factors any more easily than it could establish the substantial anticompetitive effects required before *Brown* and *Philadelphia*.²⁵ The Court merely substituted one problematic standard for another; but the substituted standard departed significantly from the statutory language. Yet, after this exercise in judicial creativity, the Court astonishingly insisted that any merger which violated the Court's new standard could not be saved "because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7."²⁶

It is important to recognize what the Court has done. First, in *Brown*, the Court constructed a legislative history which proclaimed that amended § 7's fundamental purpose was to halt in its incipency any trend toward economic concentration, even though concentration was not mentioned in the statute. Then, in *Philadelphia National Bank*, the Court proclaimed that this purpose required it to replace a thorough economic analysis of competitive effects with a single test, market concentration, even if that test might invalidate certain competitive or otherwise socially or economically desirable mergers. Arguably the merger in *Philadelphia National Bank* may have had anticompetitive effects even using traditional tests since there was some evidence that the merged firm might dominate the legally defined market,²⁷ but the Court was looking beyond the immediate merger. The Court suggested its true intention in its famous footnote 42:

It is no answer that, among the three presently largest firms . . . , there will be no increase in concentration. If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.²⁸

25 See *United States v. Von's Grocery Co.*, 384 U.S. 270, 284 n.6, 286-87 (1966) (Stewart, J., dissenting). On the limits of concentration analysis, see E. SINGER, *ANTITRUST ECONOMICS* 154-55 (1969); FTC Office of Policy Planning and Evaluation, 1976 Budget Overview, No. 692 ATRR, pp. E2-E4 (12-10-74); H. DEMSETZ, *THE MARKET CONCENTRATION DOCTRINE* (1973).

26 374 U.S. at 371.

27 If we accept the Court's market determinations, after the merger, the two largest banks would have controlled either 44% or 59% of the banking business in the relevant area. 374 U.S. at 364-65. There was evidence, however, that the Court engaged in significant gerrymandering to achieve the desired results, and therefore that the legally defined market was commercially irrelevant. 374 U.S. at 359-60. See *United States v. Continental Can Co.*, 378 U.S. 441, 469-70, 476 (1964) (Harlan, J., dissenting) on the Court's "bizarre" calculations of "non-existent" markets: "The Court's spurious market share analysis should not obscure the fact that the Court is, in effect, laying down a 'per se' rule that mergers between two large companies in related industries are presumptively unlawful under § 7." See also Rill, *supra* note 4, at 904-05; Handler, *Recent Antitrust Developments — 1964*, 63 MICH. L. REV. 59, 70-78 (1964).

28 374 U.S. at 365 n. 42.

Because its concern for competition was political, the Court turned its attention almost exclusively to concentration; but its concern for concentration reflected its desire to preserve competitors. The concern for competitors changes the Court's role from the protector of competition to the promoter of deconcentration in order to protect small competitors.

The effect of this new concern is perhaps best reflected in *United States v. Von's Grocery Co.*²⁹ Politically and economically, Von's was a perfect case for a Court desirous of extending the political understanding of § 7's purpose to its limits. Von's, a leading grocery chain, acquired a principal competitor; the merged firms accounted for 7.5 percent of the grocery sales in the relevant market. This combination occurred at a time when the number of small grocery stores was decreasing and the number of large chains was increasing. The Court found that the merger violated § 7 principally because in the grocery market there was "a long and continuous trend toward fewer and fewer owner-competitors"—"exactly the sort of trend which Congress, with power to do so, declared must be arrested."³⁰ The Court rejected Von's defense that the "grocery market was competitive before the merger, has been since, and may continue to be in the future,"³¹ because § 7 required the Court to predict future effects on competition, not to assess competition as it presently exists. "It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed."³² This, the Court insisted, was the real meaning of its cases interpreting § 7.³³

Justice Stewart's dissent eliminated any possible doubt that the purpose of the majority's doctrine was political. Sound economic analysis, he argued, would demonstrate that the relevant grocery market was unthreatened by concentration; that local competition was "vigorous to a fault," not only among the chain stores themselves but also between chain stores and the single-store operators; that there was "a surfeit of business opportunity for stores of all sizes."³⁴ The majority was interested not in economic analysis, but in using § 7 as "a charter to roll back the supermarket revolution" and preserve Mom and Pop grocery stores that were "now economically and technologically obsolete in many parts of the country."³⁵ In effect, the majority was attempting to "mold the food economy of today into the market pattern of another era."³⁶ To achieve this political purpose the major-

29 384 U.S. 270 (1966).

30 384 U.S. at 278.

31 *Id.*

32 *Id.*

33 *Id.* See also *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-53 (1966), which invalidated a merger resulting in a firm controlling 4.49% of nationwide sales in a market where there was a "marked" decline in the number of brewers.

34 384 U.S. at 287-88.

35 384 U.S. at 288. Compare *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 368 (1965); Bork, *Antitrust in Dubious Battle*, 44 ST. JOHN'S L. REV. 663, 707-16 (Special Ed. 1970); Adelman, *supra* note 4, at 243.

36 384 U.S. at 289. See Rill, *supra* note 4, at 899-901.

ity expanded the incipency test to reach mergers which no longer had a "reasonable probability" but only a "mere possibility" of lessening competition.³⁷

Justice Stewart was only partially correct. The Court continued to use a reasonable probability test to judge whether anticompetitive effects were substantial for § 7 purposes; but it had adopted an economic theory which allowed any possibility to be considered a reasonable probability. If many small competitors meant more competition,³⁸ even a slight decrease in competitors might have a substantial effect on competition. If this was not sufficient to make a mere possibility a reasonable probability for § 7 purposes, the incipency doctrine allowed the Court to predict future market conditions by projecting present concentration trends into the future.³⁹ This virtually guaranteed the probability of a future "unduly" concentrated market.

Since the Court's economics enabled it to find that virtually every merger had "substantial" anticompetitive effects, it is important to understand the foundation for those economics. When the Court introduced its new standard, it did so without further explanation because, it claimed, most economists agreed that competition would be greatest when there are many sellers, none of which has any significant market share.⁴⁰ But the Court relied upon statements made in reference to a "pure competition" microeconomic model used to study the effects of certain isolated pricing practices. By definition, there is perfect competition when there is a large number of firms, each sufficiently small so that it cannot influence the market, manufacturing products identical not only in physical characteristics but in the minds of consumers. Thus, the microeconomic perfect competition model abstracts from the distinctive traits of individual firms and products: price competition, advertising, brand names, economies of scale, selling costs, local advantages, innovation.⁴¹ But common sense, and most businessmen, would regard these factors as the essence of a competitive commercial market. Moreover, the Court not only chose an abstract, and therefore irrelevant, economic model as the § 7 standard for competition, it also chose an equally abstract oligopoly model to characterize the supposed anticompetitive effects of the projected postmerger markets. Whatever its utility to microeconomists, that model hardly described the real competitive forces of commercial markets. The Court clearly knew this. The law review article the Court used as its principal economic authority frankly stated that, if anything, economists agreed only that no model had yet been devised to evaluate the competitive tendencies of the real multiproduct, multiplant firms which competed in actual commercial markets. Just because the econometrists could not predict which mergers might adversely

37 384 U.S. at 285; see *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-23 (1962); *United States v. DuPont*, 353 U.S. 586, 598 (1957).

38 *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

39 See *United States v. General Dynamics Corp.*, 415 U.S. 486, 501-03 (1974), and text accompanying note 92 *infra*.

40 374 U.S. at 363.

41 See P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 9-13 (1970); *REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 316-320 (1955); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 602-03 (1967) (Harlan, J., concurring); *The Procter & Gamble Co.*, 63 FTC 1465, 1549 (1963), and the sources cited there at n.19.

affect competition, the article recommended that courts not allow efficiency to be used as a defense to § 7 complaints.⁴²

The Court's willingness to adopt abstract economic models in spite of their admitted significant limitations suggests the extent to which politics, not economics, ordered the Court's initial interpretation of § 7. It is important to recognize this political concern because it alone explains why, economically at least, the "sole consistency" Justice Stewart could find in the Court's § 7 opinions was that "the Government always wins."⁴³

III. The Doctrine Expands: Potential Competition

Brown and succeeding § 7 cases perceived the principal concern of the 1950 Clayton Act amendments to be the political problems caused by an increasing trend toward concentration and a corresponding decline in the number of small competitors in the American economy. The Court attempted to deal with this political problem by adopting a method of economic analysis which allowed it to enjoin politically undesirable mergers on § 7 grounds because that method identified competition with the number and size of competitors. These economics allowed the Court to achieve indirectly the perceived political end of § 7 within the limits of the statutory language. That method of analysis served the Court's intentions tolerably well⁴⁴ so long as the contested mergers were obviously horizontal or vertical. A horizontal merger actually eliminates a competitor from the market; a vertical merger replaces a free competitor with a captive competitor and therefore potentially forecloses competition in some part of the market. In both instances there exists data which can plausibly serve to show the increase in market concentration and decline in numbers of competitors necessary to suggest a probability that competition will be lessened substantially.

This method is less useful, however, if the merger is of the more exotic conglomerate type where the acquiring and acquired firms share no common markets.⁴⁵ Because such a merger neither increases any firm's share of the market nor forecloses any firm from a market or from sources of supply, there is, apparently, only a change of competitors. But there is no commonsense reason why a change of competitors might not as well increase as decrease competition. As Judge Friendly aptly remarked: "Introducing a bull into a china shop is a good way to break through the comfortable vices of oligopoly."⁴⁶ Yet it was

42 Note, *supra* note 11, at 1658-59 (1969). See also Bok, *supra* note 11, at 312 n.261; Stigler, *The Economies of Scale*, 1 J. LAW & ECON. 54 (1958).

43 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

44 This is to say only that the Court less frequently had to distort the actual economic data in order to achieve its political purpose. See notes 27 and 13 *supra*.

45 The Courts have discovered three types of these more exotic § 7 mergers: (1) the pure conglomerate merger described in the legislative history (see note 3 *supra*); (2) a geographic-extension merger where the merging companies produce or sell the same products, but do so in different product markets, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); and (3) a product-extension merger where the merging companies produce or distribute functionally related products, *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

46 *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 860 (2d Cir. 1974). See ABA, *ANTITRUST DEVELOPMENTS 1955-1968* 84 (1968); Note, *United States v. Falstaff Brewing Corporation: Potential Competition Re-examined*, 72 MICH. L. REV. 837, 848-52 (1974); Goldberg, *supra* note 4, at 158; Markham, *supra* note 4, at 289: "[V]irtually any pronouncement

precisely such mergers which most threatened to increase economic concentration and thus create the very vices which *Brown* declared § 7 was designed to prevent. To achieve § 7's design, as discovered by *Brown*, the Court needed to develop new criteria for analyzing the competitive significance of conglomerate mergers. The possibilities for such new criteria were suggested by the doctrine that § 7 was intended to prevent anticompetitive mergers in their incipiency. This allowed the Court to declare certain mergers unlawful merely because they might facilitate certain conditions or practices which threatened to depart from the Court's ideal of perfect competition, even though no injury to actual competition had yet occurred. Possessing this self-endowed ability to predict potential effects on competition, the Court needed only to find some justification for insisting that rather insignificant present practices might have significant future effects on competition. It found that justification in the same academic doctrine which allowed it to deduce anticompetitive effects from concentration ratios. Using academic oligopoly models, the Court discovered certain situations which would probably violate § 7: (1) the elimination as a potential competitor of a firm which enters the relevant market through acquisition,⁴⁷ (2) the possibility that an acquiring firm might exercise its power in its own market through implied threats or promises of reciprocity, forcing its suppliers to deal with or purchase from an acquired firm,⁴⁸ or (3) the effect on a market that the size and wealth of a new entrant might have.⁴⁹ Underlying and informing each of these concerns was the hope that by forbidding certain mergers the Court might preserve deconcentration in the relevant markets.⁵⁰ As the Court faced new, but less obviously anticompetitive challenges to its established § 7 doctrine, these considerations moved increasingly to the center of the Court's opinion.

Because there exists ample discussion of these specific tests,⁵¹ there is little need to describe them in detail. It is important, however, to indicate the reason the Court adopted them for § 7 analysis. That reason will appear from a statement of the academic foundation of the Court's potential competition theories⁵² and the political purposes those theories were intended to serve.⁵³

concerning conglomerate enterprise is more likely to reveal the personal sentiments of the individual who makes it than factually or theoretically valid generalizations on how conglomerate firms operate."

47 *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

48 *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

49 *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

50 This was the concern stated in *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 n.42 (1963), and frequently reaffirmed. While no case has relied exclusively on this consideration as a basis for holding a merger unlawful, it informs most of the decisions. *See, e.g.*, *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972); *The Bendix Corp.*, [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,288 (FTC 1970); *Beatrice Foods*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,244 at 22,335 (FTC 1965).

51 *See* the articles collected at notes 4, 35, 41, 59.

52 The use of the single term "potential competition" to describe and condemn supposedly, but less obviously, anticompetitive mergers is somewhat misleading because it confuses two different supposed threats to competition. But it was just this confusion which greatly assisted the Court in its attempt to expand the scope of § 7. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 558-62 (1973) (Marshall, J., concurring), and the text accompanying notes 70-72 *infra*.

53 For an excellent survey of the Supreme Court's potential competition cases *see* Brief for Comptroller of the Currency at 62-90, *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), reprinted in 7 LAW REPRINTS, TRADE REGULATION SERIES 382-410 (No. 6 1974).

The sources and purposes of the potential competition doctrine can be best illustrated by *FTC v. Procter & Gamble Co.*,⁵⁴ in which the Court declared that Procter's acquisition of Clorox violated § 7. Clorox was the leading manufacturer and only national marketer of household liquid bleach. Procter was the largest seller of soaps and detergents marketed and used in connection with liquid bleach, but Procter had never manufactured or sold liquid bleach.⁵⁵ Although both firms competed in a broad market for household cleansing agents, the Court decided to define the relevant § 7 line of commerce narrowly to include only household liquid bleach.⁵⁶ Because Procter did not actively participate in this market, the merger posed conceptual problems for a Court used to relying on structural tests to demonstrate competitive consequences, especially since the Court had insisted that all mergers must be tested by the same § 7 standard.⁵⁷ If Procter did not directly compete with Clorox, the acquisition would neither disturb concentration ratios nor eliminate competitors—the traditional tests for adverse effects on competition. Convinced that the merger violated § 7, the Court determined that new tests were necessary.⁵⁸ It found those tests in the academic theory of oligopoly behavior.

Simply stated, the theory claimed that oligopolists would not dominate their markets as viciously as they might if they had reason to fear potential competitors anxiously awaiting an opportunity to enter the market. To exclude those potential competitors and maintain their dominance, the oligopolists attempted to raise anticompetitive barriers to entry, principally by means of limit pricing and artificial, or excessive, product differentiation. Limit pricing supposedly occurs because oligopolists weigh the possibility of attracting new entrants before they make price and output decisions. Since the entry of new competitors could detrimentally affect profit margins, the oligopolist limits his prices to a point which will deter new entrants but above the point where it would be set in a perfectly competitive market. Thus, while they do not provide the full beneficial effects of an actual competitor, potential competitors significantly benefit competition by forcing prices lower than they might otherwise be. As an alternative or in addition to limit pricing, oligopolists supposedly raise anticompetitive barriers to new entry by artificially increasing the costs of competition. Although there are certain competitive or necessary barriers to entry such as economies of scale, the academic oligopoly theories claimed that the most significant barriers to entry were posed by product differentiation, especially that created by large-scale advertising.⁵⁹

54 386 U.S. 568 (1967).

55 386 U.S. at 572. See *The Procter & Gamble Co.*, 63 FTC 1465, 1470, 1541 (1963).

56 386 U.S. at 571. Compare *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 863 (2d Cir. 1974).

57 386 U.S. at 577. See *The Procter & Gamble Co.*, 63 FTC 1465, 1546 (1963).

58 386 U.S. at 577-78; see *The Procter & Gamble Co.*, 63 FTC 1465, 1570-71 (1963): "If mergers not falling within certain familiar categories, such as 'horizontal' and 'vertical,' are to be effectively subject to Section 7, as Congress plainly intended them to be, other means—non-percentile and non-quantitative—of roughly, but fairly, estimating the substantiality of the merger's probable adverse effects on competition in the relevant market must be found." *Id.*

59 For an elaboration see BAIN, *BARRIERS TO NEW COMPETITION* 33-41 (1956); Note, *Telex v. IBM*, 84 YALE L.J. 558, 562-63, 568-82 (1975); Backman, *Conglomerate Mergers and Competition*, 44 ST. JOHN'S L. REV. 90, 101-110 (Special Ed. 1970); Disher, *Barrier Analysis in Antitrust Law*, 58 CORNELL L. REV. 862 (1973); P. AREEDA, *ANTITRUST ANALYSIS* ¶¶

Such is the theory the Court adopted and adapted. It seems a perfect tool to expand the scope of § 7 because it greatly expands the number of firms whose acquisitions would substantially lessen competition, even though they did not eliminate competitors or increase market concentration. On the basis of this theory, the Court determined that it could act to prevent mergers which might (1) eliminate potential entrants who could discipline the market or (2) allow entry into the market of firms with the capacity to increase anticompetitive product differentiation.⁶⁰ Because Procter's acquisition of Clorox might cause both to happen, it violated § 7.⁶¹

Although the Court once more stated its potential competition theory as if it were economic orthodoxy,⁶² the theory had significant weaknesses, both conceptual and practical, which limited its utility as a test for the real commercial world. About the product differentiation claims, little of an economic nature need be said. The argument really depends upon a belief that large companies can and do engage in predatory practices. But, as Justice Harlan noted in his concurring opinion, there is simply no persuasive evidence that such predatory practices occur, except in economic models.⁶³ With respect to the purported disciplining effect of a potential entrant, there were equally obvious problems. Economists simply did not agree that the limit pricing theory accorded with commercial reality.⁶⁴ Even if accepted, oligopoly theory did not necessarily support the Court's political purposes. Bain had suggested that oligopolies maintained themselves because of high entry barriers; but entry barriers could be created by real efficiencies of large-scale plant and firm or by certain government granted monopolies such as patents and trademarks. In any case, it would be exceedingly difficult to devise a policy for attacking concentration without adversely affecting efficiency.⁶⁵ More importantly, where the high entry barriers were caused not by efficiencies but by product differentiation, Bain suggested

117, 603, 666-67 (2d ed. 1974). Note that the theory assumes that all competitors act alike and therefore that when a different competitor enters the market, the competitive structure will remain unchanged. That is a necessary assumption for creating a model to test economic hypotheses; it is hardly a necessary or true assumption about actual commercial competition. See text accompanying note 46 *supra*.

60 386 U.S. at 578. There was a third possible adverse effect which the Federal Trade Commission had emphasized but the Court did not: Procter & Gamble's ability to shift financial resources and competitive strength through a broad front of different products and markets and its ability to alter strategically the selected point of its greatest impact as time, place, and market conditions required. See *The Procter & Gamble Co.*, 63 FTC 1465, 1531-32, 1567 (1963).

61 386 U.S. at 578-79. The Court and the FTC especially emphasized Procter & Gamble's role as an advertiser and the fact that all brands of household bleach were chemically identical. 386 U.S. at 572, 579; *The Procter & Gamble Co.*, 63 FTC 1465, 1538-42 (1963). This supposedly proved that there was unnecessary, i.e., uncompetitive, product differentiation and that the acquisition would enable Procter to increase entry barriers significantly.

62 See text accompanying note 40 *supra*; see also *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 582, 590 (1967) (Harlan, J., concurring), criticizing the majority's "*res ipsa loquitur* approach to antitrust cases."

63 386 U.S. at 588. Compare, Turner, *supra* note 4, at 1339-52; Adelman, *supra* note 4, at 242; Backman, *supra* note 59, at 110-18.

64 Bain, *supra* note 59, at 206, himself admitted that his theories were based on "tentative or only partly-tested theories" with a limited factual foundation. A key, but unfounded, assumption was that "there is effective concurrence of market action by established sellers in establishing some approximation to a joint-profit-maximizing price. . . ." *Id.* at 33. He only "parenthetically" considered the possible imperfections of express or tacit collusion, but that obviously is the most significant consideration for practical purposes. *Id.*

65 Bain, *supra* note 59, at 207.

that it was precisely "established firms in other industries" which could best surmount the entry barriers and bring new competition into an oligopolistic market.⁶⁶ Thus it could just as easily be argued that leading firm mergers would encourage competition; but they would do so only by increasing the economic concentration which the Court insisted that § 7 was designed to prevent.

Despite these obvious objections to the potential competition theory, the Court insisted upon using it to ban certain conglomerate mergers principally because it offered yet another opportunity to assist the small competitors whose interests had occupied the Court since *Brown*. Before introducing the potential competition theory, the Court had repeated the FTC's warning that the "practical tendency" of the Procter-Clorox merger would be "to transform the liquid bleach industry into an arena of big business competition only, with the few small firms that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals."⁶⁷ Once again politics defined the Court's economics.

Conceptual problems aside, there remained a practical difficulty which threatened to limit significantly the potential competition theory's ability to expand the scope of § 7. The theory presupposed that the market was already concentrated, that a limited number of outside firms possessed the capacity and incentive to enter the market, and that those potential competitors were perceived by the actual competitors.⁶⁸ The reasons for these limits were obvious. In an unconcentrated market, oligopoly theory did not apply by definition. If there were many potential entrants, the loss of one through merger would be insignificant. If the potential entrants were not perceived, there was no incentive to limit price or otherwise raise barriers to entry.

But if the Government had to prove each of these conditions precedent to oligopolistic behavior before it could apply its potential competition theories, the burden of proof in a § 7 case could be insurmountable. Facing that kind of challenge in *Philadelphia National Bank*, the Court had resolved to ease the burden of proving mergers violated § 7 by relying upon concentration trends.⁶⁹ It made a similar resolution in its potential competition cases. The Court decided that there was really no need to prove actual intentions and perceptions; it would be enough to show what should have been intended and perceived. In the place of actual competitors, the Court injected a reasonable man into the marketplace. This amendment to academic potential competition theory was stated in *United States v. Falstaff Brewing Corp.*⁷⁰ The Government had contended that Falstaff's acquisition of Narragansett Brewery violated § 7 because it eliminated a potential

66 *Bain, supra* note 59, at 215. Compare *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 860 (2d Cir. 1974).

67 386 U.S. at 575, citing *The Procter & Gamble Co.*, 63 FTC 1465, 1573 (1963). The Court's political will to invalidate the merger is further suggested by the fact that the evidence did not support the Court until the academic, but commercially unfounded, potential competition theory was adopted. The FTC twice heard the case. The first Commission rejected a finding of anticompetitive effects, as did the Court of Appeals. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 570 (1967); *Procter & Gamble Co. v. FTC*, 358 F.2d 74, 83 (6th Cir. 1966).

68 See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578-81 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-74 (1964); and note 59 *supra*.

69 See text accompanying note 22 *supra*.

70 410 U.S. 526 (1973).

competitor from the New England beer market. The District Court rejected this contention because there was no significant evidence that Falstaff actually intended to enter the market or that the other competitors believed Falstaff would enter; therefore Falstaff was not in fact a potential competitor. Remanding the case, the Supreme Court insisted that such evidence was not necessary. The crucial question was "whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market."⁷¹ The true test should be not whether Falstaff was in fact a potential competitor but whether it could be considered a potential competitor.

By adopting this reasonable man test, the Court completely freed the meaning of "competition" in § 7 from any commonsense or commercially restrictive restraints. Of course, reasonable still could have been interpreted to mean what a reasonable businessman might perceive or intend; but that is not what the Court meant. Reasonable meant what firms would do if they acted in accordance with the Court's notions of oligopoly behavior.⁷² The Court had finally achieved an effective means of identifying competition in § 7 with competitors, even in conglomerate merger situations.

After *Falstaff* the only remaining restraint which the statutory language imposed on antitrust policy was the requirement that a merger's anticompetitive effects appear in a relevant product or geographic market. This requirement posed significant problems for the Justice Department in its efforts to apply § 7 to the so-called pure conglomerate merger. Because a pure conglomerate had no permanent commitment⁷³ to any particular market, it was a potential entrant into every market but a probable entrant into none. Even the Court's reasonable man could hardly insist that it was reasonable to suppose that a conglomerate would probably have entered any specific market in the way that Falstaff would have entered the New England beer market or Procter & Gamble the household bleach market.

Clearly understanding the political dimensions of the Court's § 7 opinions,⁷⁴ the Justice Department attempted to remove this restraint by a new theory of § 7 articulated in five conglomerate complaints filed with the intention of giving the Supreme Court an opportunity to test the applicability of § 7 to conglomerate mergers.⁷⁵ The gist of these complaints was that a merger between large firms

⁷¹ 410 U.S. at 533.

⁷² 410 U.S. at 533-34, 544, 548, 566-69.

⁷³ On the importance of a "permanent commitment" to a particular industry for potential competition theories see *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 861 (2d Cir. 1974).

⁷⁴ See Statement by Antitrust Division Chief Richard W. McLaren before the House Ways and Means Committee, March 12, 1969, 5 TRADE REG. REP. ¶ 50,101 (1969); Address by Attorney General John N. Mitchell before the Georgia Bar Association, June 6, 1969, 5 TRADE REG. REP. ¶ 50,107 (1969); Address by Roland W. Donnem, Director of Policy Planning for the Antitrust Division, November 10, 1969, 5 TRADE REG. REP. ¶ 50,113 (1969); Statement by Antitrust Division Chief Richard W. McLaren before the Senate Subcommittee on Antitrust and Monopoly, February 18, 1970, 5 TRADE REG. REP. ¶ 50,114 (1970). But see President's Task Force Report on Productivity and Competition [Stigler Report], June 16, 1969, 5 TRADE REG. REP. ¶ 50,108 (1969).

⁷⁵ *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D.Conn. 1969) (Grinnell Corp.) (decided with *United States v. International Tel. & Tel. Corp.* [Hartford Fire Ins. Co.]); *United States v. Northwest Industries, Inc.*, 301 F. Supp. 1066 (N.D.Ill. 1969); *United States v. International Tel. & Tel. Corp.*, [1961-1970 Transfer Binder] TRADE REG. REP.

could violate § 7 merely because of the great economic power which would result from the merger, even if the firms had no prior competitive relationship. Thus it was argued that ITT's proposed merger with Hartford Fire violated § 7 primarily because "Hartford [was] a potential competitor of ITT in various fields by virtue of its excess surplus of approximately \$400 million which could be used to expand into other areas and that it had an active acquisition program which came to a halt when it agreed to merge with ITT."⁷⁶ This radical extension of the potential competition to include even the slightest possibility of competition was founded upon a belief that large conglomerate corporations threatened competition by their ability to deploy their vast financial resources wherever in the corporate structure that the greatest gains could be realized⁷⁷ and that such deployment must produce anticompetitive effects somewhere "in numerous though undesignated lines of commerce."⁷⁸ Therefore any merger between large firms might be anticompetitive for § 7 purposes even without proof of anticompetitive effects in specific product or geographic markets.

Though the District Court refused to accept such a radical departure from the statutory language,⁷⁹ it is not at all clear that its opinion reflects the spirit of the Supreme Court's § 7 cases. That spirit had caused the Court initially to go beyond the statutory language because it perceived a political need to interpret competition so that it would serve the statute's political purpose of preventing concentration and protecting small competitors. But if many competitors meant more competition, there is no reason why a merger producing fewer competitors in the economy as a whole might not violate § 7 as much as one producing fewer competitors in a particular market. It is no objection that the statute does not speak of the economy as a whole; it did not speak of competitors either.

IV. The Reaction: A New Antitrust Majority?

This final extension of § 7 has yet to be achieved. The Justice Department lost each of its conglomerate cases and settlement before appeal deprived the Supreme Court of an opportunity to explore the merits of the department's legal theory.⁸⁰ Since then there has been evidence of a new antitrust spirit in the courts which threatens to destroy the political basis for the Supreme Court's economics.⁸¹ Evidence of this new spirit appears in recent § 7 decisions by the Supreme Court's

¶ 45,069 at 52,715 (N.D.Ill. 1969); *United States v. Ling-Temco-Vought, Inc.*, [1961-1970 Transfer Binder] TRADE REG. REP. ¶ 45,069 at 52,712 (W.D.Pa. 1969).

⁷⁶ *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766, 795 (D.Conn. 1969), *aff'd* 324 F. Supp. 19 (D.Conn. 1970). *See also* *United States v. Northwest Industries, Inc.*, 301 F. Supp. 1066, 1096-97 (N.D.Ill. 1969).

⁷⁷ *See* note 60 *supra*; *see also* E. SINGER, ANTITRUST ECONOMICS 259-69 (1968).

⁷⁸ *United States v. International Tel. & Tel. Corp.*, 324 F. Supp. 19, 52 (D.Conn. 1970). *See also* Donnem, *supra* note 74, ¶ 50,113, at 55,166-67.

⁷⁹ *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766, 796 (D.Conn. 1969). *See also* *United States v. Northwest Industries, Inc.*, 301 F. Supp. 1066, 1096 (N.D.Ill. 1969).

⁸⁰ Obviously there are also political reasons for these settlements which may strip them of legal significance. For the legal reasons *see* *United States v. International Tel. & Tel. Corp.*, 349 F. Supp. 22 (D.Conn. 1972) (motion to set aside settlement denied); Remarks by Antitrust Division's Donald Baker on . . . the ITT Settlement, No. 687 ATRR, p. E1, E3 (11-5-75); ITT Cases—White Paper, January 8, 1974, 5 TRADE REG. REP. ¶ 50,193 (1974).

⁸¹ *See, e.g., United States v. Falstaff Brewing Corp.*, 383 F. Supp. 1020 (D.R.I. 1974), where, on remand from the Supreme Court, the District Court refused to enjoin Falstaff's

purportedly "new antitrust majority,"⁸² especially *General Dynamics*⁸³ and *Marine Bancorporation*,⁸⁴ which suggest the limits of § 7 for any court which has lost *Brown's* vision of that section's political purpose. The recent decisions have applied the criteria established by the earlier § 7 cases, but have nonetheless upheld mergers which surely violated the spirit of § 7 as proclaimed by those cases. The new majority could do this because the *Brown* majority had been forced by § 7's language to devise its political test in economic terms. However the *Brown* majority had ensured that those economic terms would serve its political purpose by manipulating market data and concentration trends and by analyzing that data with economic models which unduly abstracted from the commercial realities of the markets the Court was evaluating. What the new antitrust majority did, simply stated, was accept *Brown's* § 7 tests but apply them by carefully attending to economic and commercial realities. *Brown* had suggested that this might be done (though it did not do it);⁸⁵ *Philadelphia National Bank* insisted that where undue economic concentration imminently threatened *Brown's* political ends, it would be proper to dispense with detailed economic analysis.⁸⁶

General Dynamics illustrates the new antitrust majority's analytical method. There the Court upheld the merger of two coal companies, despite the Government's claim that the coal industry was an oligopoly and that concentration in the industry was increasing. On the authority of *Philadelphia National Bank*, the Government argued that because § 7 was designed to prevent even slight increases in concentration, the merger was obviously illegal.⁸⁷ While it granted that decisions since *Brown* had tended to find § 7 violations on the basis of concentration statistics alone, the Court recalled *Brown's* warning that market share and concentration statistics should not be conclusive.⁸⁸ Any intelligent analysis, the Court insisted, must examine the reasons for concentration and the decline in the number of competitors.⁸⁹ This was precisely what the Court had rejected in *Philadelphia National Bank* in order to effect Congress' desire to protect small businesses.⁹⁰ In *General Dynamics* the survey of economic evidence disclosed that the number of competitors declined not because of acquisitions or unfair

merger with Narragansett and summarily rejected the government's claim that Falstaff had been a potential competitor in the New England beer market, even on the basis of the "objective" criteria set down by *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1972). Also *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), cert. denied, 418 U.S. 919 (1974).

82 The description is offered by Mr. Justice White, dissenting in *United States v. Marine Bancorporation*, 418 U.S. 602, 642 (1974).

83 *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

84 *United States v. Marine Bancorporation*, 418 U.S. 602 (1974). See also *Gulf Oil Corp. v. Copp Paving Co.*,—U.S.—, 95 S.Ct. 392 (1974), which narrowly construed § 7's "in commerce" requirement.

85 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320-22, 336 (1962). Compare *United States v. Continental Can Co.*, 378 U.S. 441, 449-56 (1964); *United States v. General Dynamics Corp.*, 341 F. Supp. 534, 555-58 (N.D.Ill. 1972).

86 *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963), and text accompanying note 22 *supra*.

87 415 U.S. at 492-94, citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 n.2 (1963).

88 415 U.S. at 496-98, citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-22 (1962).

89 415 U.S. at 499-500. Mr. Justice Stewart, who wrote the *General Dynamics* opinion, had forcefully argued this point in his dissent to *United States v. Von's Grocery Co.*, 384 U.S. 270, 289 (1966).

90 See text accompanying notes 22-24, 29-33, 69-70 *supra*.

competitive practices but "as the inevitable result of the change in the nature of the demand for coal."⁹¹ The Court then further separated itself from the spirit of the earlier cases by rejecting their belief that a merger's incipient effects could be assessed by projecting past trends into the future. Such projections reveal nothing about probable "future ability to complete," the Court insisted, but that is the only relevant consideration when evaluating incipient competitive effects.⁹²

In *Marine Bancorporation* the Court suggested the relevance of its new antitrust policy for potential competition doctrines. At issue was a merger between a large Seattle bank and a medium-sized Spokane bank. The Government challenged the merger because it eliminated the Seattle bank as a probable entrant and thus eliminated the possibility that new entry might deconcentrate the Spokane market. In upholding the merger the Court challenged the whole basis of antitrust policy at least since *Philadelphia National Bank*.⁹³ The Government could use § 7 to preserve possibilities for deconcentration only if it proved that such results were "realistically possible."⁹⁴ To do so, the Government would have to prove that (1) the acquiring firms had "an available feasible means" for entering the market other than by the challenged acquisition and (2) those means offered "a substantial likelihood of producing deconcentration of that market and other procompetitive effects."⁹⁵ While these qualifications probably more nearly reflect academic assumptions and commercial realities than did the earlier potential competition cases, there is little doubt that by introducing them the Court had, as the dissent emphasized, "chipped away" at the policies of § 7 by "dramatically escalat[ing] the burden of proving that the merger 'may be substantially to lessen competition'"⁹⁶ The minority clearly perceived that the increased burden reflected more than an evidentiary issue; the Court had dispensed with elaborate economic analysis in the past because only lower standards of proof seemed to promote the political purpose of § 7.⁹⁷ "In the last analysis, one's view of this case, and the rules one devises for assessing whether this merger should be barred, turns on the policy of § 7 of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business."⁹⁸ It was that understanding of § 7's purpose which the new majority questioned.

91 415 U.S. at 492-93, 506.

92 415 U.S. at 501-03. The Court's willingness to expand the relevant product market to include all energy sources was important here, for two reasons: it reduced the concentration ratios and it changed the nature of the competitive challenges faced by the coal companies. See 415 U.S. at 492-93, 515. But see *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th cir. 1972); Note, 86 HARV. L. REV. 772, 780 (1973).

93 While the Court emphasized that it was dealing with the banking industry where there were important regulatory barriers to entry which made it particularly difficult to apply potential entrant theories, the logic of the Court's opinion suggests its greater relevance. This relevance is especially emphasized by the excellent brief offered by the Comptroller of the Currency in support of the merger. Brief for Comptroller of the Currency, *supra* note 53, at 62-90. It is nonetheless true that bank mergers have posed special problems for the Justice Department. It has lost every potential competition bank merger case it has tried. See Robinson, *Antitrust Developments: 1974*, 74 COLUM. L. REV. 163, 189 & n.162 (1974).

94 418 U.S. at 633. But see *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 544 (1973).

95 *Id.*

96 418 U.S. at 642.

97 See text accompanying note 22 *supra*.

98 418 U.S. at 653. Compare *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 859-60 (2d Cir. 1974).

V. Conclusion

Now that a new antitrust majority has revealed its desire to transcend *Brown's* limits, the time has come to restate the purposes of Clayton § 7. While the new majority's efforts to make more commercially realistic judgments about markets and competitive effects can diminish *Brown's* practical consequences, they can hardly serve as the basis for a sound antitrust policy. To mention only the most obvious difficulty: even the most thorough market analysis can be made to prove anything or nothing. As the Justice Department's conglomerate complaints well illustrate, "realistic" markets are bounded only by the imagination.⁹⁹ Rather than more realistically apply the old standards, the Court must attempt a more realistic definition of § 7's purpose and political limits. No doubt the Court may be tempted to depart from *Brown* only in order to establish more realistic tests of a merger's effects on competition. While such tests would most probably return the Court's attention from competitors to the statutory concern with competition, they would not define that concern. The original statutory concern reflected a belief that a competitive economy would provide the greatest material progress, not only for small competitors but for everyone and that this material progress would be conducive to the preservation of our political and social institutions.¹⁰⁰ Yet it was obviously not a concern for material progress which moved the *Brown* court. What lies at the roots of *Brown's* concern with competitors who cannot effectively compete is the fear it expresses about whether an efficient, competitive economy would in fact be socially and politically beneficial if it necessarily created gigantic, irresponsible concentrations of capital. This political fear is perhaps best reflected in Mr. Justice Douglas' lament for the bygone "glories of Goldendale"—a small Washington town ravished by "men on the 54th floor with only balance sheets and profit and loss statements before them to decide the fate of communities with which they have little or no relationship."¹⁰¹ To this fear economic analysis is simply irrelevant. If the new antitrust court hopes to develop a more commercially realistic antitrust policy, it must articulate an effective response to these political and social concerns.

Stephen Wasinger

99 See text accompanying notes 74-79. Compare the District Court's market definition with the Circuit Court's in *Telex Corp. v. International Business Machines*, 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd* 1975 Trade Cases ¶ 60,127 (10th Cir., filed Jan. 28, 1975).

100 See *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) and note 16 *supra*.

101 *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 541-43 (1972). Also: "A nation of clerks is anathema to the American antitrust dream." *Id.* See *United States v. Columbia Steel Co.*, 334 U.S. 495, 535-36 (1948) (Douglas, J., dissenting); *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).